SUPREME COURT OF THE UNITED STATES

ELBERT WELCH

86-6884 *v.*

HAROLD J. SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES HENRY MILLER

86-7132 *v.*

R. D. SIMMONS ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 86-6884 AND 86-7132. Decided October 13, 1987

The petitions for writs of certiorari are denied.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

The issue here is whether an order denying a civil rights plaintiff's motion for appointment of counsel is immediately appealable under 28 U. S. C. § 1291, as interpreted by *Cohen* v. *Beneficial Industrial Loan Co.*, 337 U. S. 541 (1949), and its progeny. In both of these cases petitioners brought their actions under 42 U. S. C. § 1983, and sought appointment of counsel under 28 U. S. C. § 1915(d). The district courts denied those motions and petitioners appealed. In *Welch* v. *Smith*, although stating that if the question were before the court "as one of first impression, we would find it of considerable intricacy, in light of the weighty competing interests involved and the varying resolutions of our sister circuits," 810 F. 2d 40, 41 (1987), a panel of the Second Circuit held that the denial was not immediately appealable under its earlier decision in *Miller* v. *Pleasure*, 425 F. 2d 1205 (CA2), cert. denied, 400 U. S. 880 (1970), which itself had overruled an even

earlier decision concluding the opposite, *Miller* v. *Pleasure*, 296 F. 2d 283 (CA2 1961), cert. denied, 370 U. S. 964 (1962). The position of the Second and Fourth Circuits, which is consistent with that of a number of the Circuits, conflicts with the position of two other Circuits. *Jackson* v. *Dallas Police Department*, 811 F. 2d 260 (CA5 1986) *(per curiam)*; *Slaughter* v. *City of Maplewood*, 731 F. 2d 587 (CA8 1984). The confusion in this area is further exemplified by the Ninth Circuit's position that civil rights plaintiffs proceeding under Title VII may immediately appeal a denial of their motion for appointment of counsel, while those proceeding under § 1983 may not. Compare *Wilborn* v. *Escalderon*, 789 F. 2d 1328 (CA9 1986), with *Bradshaw* v. *Zoological Society of San Diego*, 662 F. 2d 1301 (CA9 1981). I have previously dissented from denial of certiorari in a case raising this question in the context of suits filed under Title VII and § 1983, *Henry* v. *City of Detroit Manpower Department*, 106 S. Ct. 604 (1985) (WHITE, J., dissenting). The continued split amongst the Circuits on this issue warrants our granting certiorari.